In the Supreme Court of the United States.

OCTOBER TERM, 1904.

THE UNITED STATES, THOMAS SIMPSON, and WHITE SWAN, appellants,
v.
LINEAS WINANS AND AUDUBON WINANS, partners, doing business under the firm name of Winans Brothers, respondents. } No. 180.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WASHINGTON.

BRIEF FOR APPELLANTS.

THE CASE AND THE PLEADINGS.

This case involves Indian rights of fishery in and on the Columbia River. It is a bill in equity filed by the United States July 11, 1895, in the Circuit Court of the United States for the District of Washington, on behalf of the confederated bands composing the Yakima or Yakama Nation, against the Winans Brothers, who are engaged in a large commercial fishing enterprise at the locality where the Indians claim rights. The defendants assert the right to title in fee to the bordering lands through patents from the

United States, and to the shore from the State, and the right to exclude the Indians altogether from these lands and, as a practical consequence, from access to and participation in the particular fishing places.

The bill shows that for many years prior to 1855 these Indians possessed and claimed the country along the Columbia and from time immemorial fished in its waters in the locality in question on the north shore of the river, having huts there for use during the fishing season and for curing fish for their steady subsistence, pasturing their horses and cattle on the lands bordering the river, with free access to the fishing grounds. These lands were Indian country and were so recognized by the United States. On June 9, 1855, the Government entered into a treaty with them by which they ceded these lands lying north of the Columbia, with certain reservations, and as part of the consideration the United States guaranteed to them for their use in common with citizens of the Territory the right of taking fish "at all usual and accustomed places;" the right of erecting temporary buildings for the purpose of curing fish; together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle on open and unclaimed land. The Indians, after as before the treaty, fished and enjoyed their other rights and privileges, as defined, at divers places along the north shore of the Columbia in the township embracing the fishing places involved in this suit, and particularly at those places, until they were interrupted and prevented by the defendants,

who by force and threats have driven them away and refuse to allow them to come to the fishing places, have torn down their houses and refuse to permit them to rebuild. The peculiar formation of the shore line at this locality, with the rocks, channels, and eddies, enabled the Indians to take fish effectively with their dip nets, spears, and other primitive appliances; the defendants maintain and operate large fish wheels, which catch all the fish at the usual runways, and prevent the Indians from taking any fish at all. The claim of the bill was that whatever right and title the defendants might have to lands in the sections bordering on the river was subsequent, subordinate, and subject to the Indian right of way and temporary occupancy for fishing purposes, and the prayer was for an injunction to restrain defendants, their agents, etc., from molesting the Indians and preventing them from taking fish at these accustomed places, from having free access, from erecting and using temporary houses, and for other suitable relief. The affidavits (Rec., pp. 9–11) fully sustain the bill.

An injunction was granted (Rec., pp. 12–16) comprehensively commanding that the Indians should not be interfered with in the enjoyment of any of the rights claimed and specifically directing the defendants to desist from constructing, operating, or maintaining fish wheels in such manner as to prevent the Indians from fishing.

The defendants demurred to the bill, and pending hearing the restraining order was modified in pursuance

of stipulation (Rec., pp. 19, 20, 34)—in which the right thereafter to assert the full claims was reserved to both parties—so as to give the Indians the right of taking fish at the points in controversy in common with the defendants, assuring them free ingress and egress, the use of the bordering lands and of adjacent vacant lands for pasturage. The demurrer was overruled (Rec., pp. 21–24) on the ground that it was an invasion of the rights secured by the treaty to exclude the Indians from the fishing, but that the right to erect temporary buildings at any particular spot ceased when title issued from the Government and was vested as private property; that, however, "the bill states facts sufficient to require the court to enjoin the defendants from interfering with the Indians in the enjoyment of their common right of fishery, although, in my opinion, the court will not be justified in issuing process to compel the defendants to permit the Indians to make a camping ground of their property while engaged in fishing" (p. 24).

The defendants then answered (pp. 25–32) that the Indian claim covered all lands mentioned in the treaty, as "Indian country" only, and embraced various fisheries along the Columbia as well as the particular localities in suit; that there were no rights peculiar to these localities, but they were common to all the fishing places; that the United States by the treaty was acquiring the Indian title, but that no lands were conveyed to the United States and no lands bordering on the Columbia were reserved for the use of the Indians

for fishing purposes; that the treaty simply secured the right of taking fish at all usual and accustomed places in common with citizens, with the privilege of temporary occupancy, pasturage, hunting, etc., upon unclaimed land in the vicinity, and these rights did not refer to the particular township or locality, but to various places. There were formal denials of customary fishing by the Indians at the points in dispute, resting on the averment that since the particular shore lands were patented the Indians have been prevented by the owners from exercising any rights inconsistent with ownership of the soil except such as the owners saw fit to grant. It was denied that the Indians had been driven from the fishing places by force and intimidation, or their temporary houses destroyed, and that they had been excluded from their rights of fishery by the maintenance of the fish wheels, all such traverses being founded on the averment that the defendants had merely refused to allow the Indians to trespass on patented lands, the absolute title to which had passed from the Government and which the defendants held under bond for a deed. It was asserted that at the place in question, extending along rapids of the Columbia for over a mile, there are many hundreds of points besides those occupied by the fish wheels where the Indians did fish and could still but for the private ownership and the trespass upon patented lands; that at various points along the river above and below there are fishing places where the title to abutting lands is still in the United States; that the defendants

fenced their property to protect their lands for pasturage, inclose their houses and preserve their fruit trees and vegetables; but notwithstanding their exclusive rights the Indians had repeatedly trespassed on the property.

The cause was then put at issue by replication; upon an interlocutory and auxiliary application for warrant in contempt for violating the modified injunction, the court held the showing insufficient (p. 35) on the ground that the fence complained of in that interlocutory application obstructed a mere trail and not an existing road; and the cause was then (November 12, 1896) referred to an examiner to take and report testimony. After final hearing (May 20, 1902) the court filed a memorandum decision on the merits, February 23, 1903, and on May 28, 1903, entered a decree dismissing the bill (pp. 38, 39). Direct appeal to this court was then allowed. As the construction of a treaty is involved, and this ground of jurisdiction embraces an Indian treaty (*New York Indians* v. *United States*, 170 U. S., 1; *United States* v. *Choctaw Nation*, 179 U. S., 494), that course is correct under section 5 of the judiciary act of 1891.

THE TESTIMONY.

The testimony, documentary evidence, and exhibits comprise pages 40–248 of the record.

This is a famous fishery and has been from time immemorial. It covers about a mile and a half of rocky channel and swift current with shore and water conditions most favorable for taking salmon in large quantities—relatively, by the Indian primitive methods,

and absolutely by the modern, wholesale device of fish wheels. In a given time, and a short one, depending, of course, on the season and the "run," the Indians took them by hundreds, the wheel takes them by tons. "They [that is, the defendants] haul them away with four-horse teams;" three or four wagon loads every day. (Rec., pp. 94, 95.)

This fishery was known to the whites from the early days as the "Tumwater," and to the Indians under two names, Wisham, denoting the upper end of the rapids, and Se-we-pam (or See-we-paum), describing the lower end, where the rapids begin to tail off into eddies. It appears clearly enough from the evidence that it is as good a fishery as any on the river, and, on the Washington side and above the lower reaches of the Columbia, toward the sea, plainly the best. It is because it is the best for dip nets that the Indians always resorted there, and because it is the best for the destructive means of wheels that the Winans established themselves there. There can be no doubt that the Indians fished there regularly back to a traditional past, how long no man, Indian or white, can say. They went annually to this fishery, camped there, pastured their animals on the bordering lands, and caught and cured fish in great quantities. It was their staple at all times, fresh or dried; they were raised on this food; they miss it and need it. Their physical condition and general *morale* are less good than when they had an abundant supply. Berries and roots are certainly precarious; there are few deer in that country; it is no answer to

their claim to say that they are as well off now and have merely shifted their dietary; that living on a reservation and attached allotments, as they do or may, they cultivate small farms and eat potatoes and perhaps an occasional slaughtered animal of their own. The reason the Indian does not get as much salmon as he used is because he is not permitted to; he hasn't the money to buy, and that is all there is of it. But he wants salmon and needs it as much as ever.

The Indians testified clearly and strongly on all these points—as to their constant use of dip nets formerly at the points in controversy, which was denied or doubted in a merely speculative sort of way by the defendants and one or two of their witnesses who were also fishermen and interested on that side; as to the belief and understanding among the elder Indians who were cognizant of the treaty negotiations that the United States was guaranteeing and preserving to them a real right which they had always enjoyed and without which they would not have entered into the treaty. It is shown that there was demur over this very matter and the negotiations of Governor Stevens and General Palmer were not successful until the Indians had received complete assurances on the point. The temporary houses at the Se-we-pam end were torn down, the Indians say, with aggressive harshness. At the Wisham end there is some doubt whether a few of the old houses are outside the inclosure; some of them appear to be standing. It makes little difference, because there is no object in occu-

pying them now; fewer Indians approach the place than formerly, of course; they have been driven off year after year and are discouraged. The few who do linger about and return are not permitted to approach the river. It is said they can get to the river along the "Colwash trail," which appears to come down outside the inclosures at the Wisham end, but that is futile. When they get there they can not fish; they are barred by the fence and by force, too, from going along the shore to the fishing points, and altogether from fishing. The notion that there is a road open to the river along or near the side lines of the fence is manifestly illusive, and the defendants, in their own testimony, are much too candid to advance it as a pretext. Notwithstanding Judge Hanford's views concerning the "Colwash trail" (Rec., pp. 35, 36), it is in evidence that among many mere trails running to the river and the fishing places over the patented lands, there was at least one well marked and traveled, 50 feet wide, used for wagons as well as horses, ridden and "packed," which was cut off and closed by the fence. (Seemingly the "middle trail," as the witness Simpson calls it, pp. 45, 46.) The situation of the Indians is far from humorous, but it suggests the old rhyme in which a borrower is told that he can not have his friend's bellows, but can sit by his fire and blow. The Indians can work for the Winans if the latter choose; they can buy salmon at a quarter each. They can have the eels which are thrown away, they can have the heads and tails from

the scrap heap, which are considered by some people the greatest delicacy—"they think they are the very best part of the fish" (Rec., p. 178); they can go to the river along the Colwash trail and sit at that one point and contemplate the Winans wheels running fish out of the river by the ton.

I do not intend to draw upon the pathos of the case, though there is pathos enough in it, except to those who are utterly cynical about virtue in the Indian, hardship in his lot, or merit in his plea that white civilization should not wipe him out with unnecessary haste and cruelty. Pathos alone does not move equity, but the springs of equity and pathos often lie close together.

The Indians were also barred from a spring of water near the Wisham end, from which they had always drawn their supply. Hear what an old Indian man said about their deprivation of fish and the destruction of their houses, and an old woman's view of the spring:

> Q. How old are you?—A. I don't know my age; I am pretty old; I don't know my age.
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> Q. How old were you when the treaty was made?—A. I don't know how old I was, but I was married and had a boy.
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> * * * * *
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> Q. Have you suffered any for food since this fishery has been fenced in?—A. There are lots of time I wished to get something to eat, such as salmon. Now, I have given up all hopes and have made up my mind I am going to starve myself to death.

Q. How many Indians are situated that way?—A. Four of us; we can't hardly help ourselves, except we depend on fish.

Q. How many others are in the same condition?—A. There are a great many that is around here—I don't know how many. They all feel very bad about not getting any salmon, and they think they are going to starve themselves to death.

Q. Explain just the circumstances of the tearing down of your house.—A. I was there at my house, sitting down, not knowing anything; I couldn't tell how many years; pretty soon a man come there and he says to me, "If you don't get out of here I will tear your house down." I did not believe him, that he would do it; pretty soon he put a lasso on our house. I got scared and cried, and put a little barrel on my back and took that and went away crying. He said, "If you go to make any more trouble around here, I will put you in jail." I said, "All right; you can take me." That is all I said to him; what little things I had I was picking up and taking away; I was crying.

Q. How long had you lived in that house?—A. I lived there ever since I can remember—until I am this age now. (Rec., pp. 104–105.)

Q. How many years have you caught fish there, at See-we-pam and Wisham?—A. Never go any other place but there; go there all the time. There was no white people yet; there was only Indian people. My father was taking care of all the Indians there. I don't know when the white people come to this country. I

didn't know they was going to build lots of houses here. When I got to be a woman, then all come; that is the treaty and I was there. Then afterwards some more white people come.

Q. I don't care about the white people coming; I wan't to know about this fishery.—A. I know about catching fish there. My father fished there. We catched salmon here, dried them, and when it was dried we buried it in the ground; that is what we keep for winter's supply. And just now, where the fishing ground is now, Winans put up a fishing wheel there, and the Indians never go there any more. You see I am dry now; I got no flesh on me now. Then, later, he fences clear around; that is the way he treats us now. We can't go. We are afraid to go in the fence there to get water. We dry for water also; we can't get water and we can't get salmon.

Q. Where did you used to get water?—A. There is one spring there then; we go to the river and get water.

Q. How far is that spring from the river, or from your house?—A. Not far. (Rec., pp. 115–116.)

Here are other statements about the spring:

Q. Before it was fenced in, did you get your water from the river?—A. Right next to the river is a spring.

Q. Can you get water there now?—A. The fence is there; I can't go there.

Q. How far is that spring from your house—the one that is fenced in?—A. I can't tell. It is very close. (Rec., p. 92.)

> Q. Where do you get the water from you drink?—A. Mr. Winans told me that I must not go down to this spring to get any water where we had been in the habit of getting water, and we had to go up the fence about half a mile; but sometimes we stole through the fence; crawled under the wire to get our drinking water. (Rec., p. 102.)

I am unable to see what difference it makes that as the river rises and falls a fisherman using a net must move back and forward. There were none the less certain favored and advantageous spots within the mile and a half of river front, which were "usual and accustomed places," where the Indians congregated, changing, of course, from one rock and runway to another, behind or in front, as the water rose and fell. It is plain that the most advantageous spots for the most prolific stage of water have been seized for the three stationary wheels. It is also evident that the lower wheel is located at a particularly famous rock, which by blasting, to place the wheel, has been largely destroyed (it would seem) for Indians' use even if the wheel were removed.

The inquiry whether the fish die after reaching headwaters for spawning, either because of functional consequences or because they are weakened and bruised by their long and rough journey away from the sea, is merely speculative; but the question what proportion of the fish is taken in the wheels is of immediate im-

portance. Of course there would not be wheels one after another all along the river above tide if many fish did not get through any particular wheels. The wheels are numerous enough (thirty-eight altogether, Rec., p. 218), but evidently they do not cover all the channels and runways, even at the narrower and swifter points; and they do not operate like a sieve or net, stopping and catching everything. Many fish get through, of course. If that were not so, it would only take a year or two to destroy this food supply altogether instead of merely diminishing it rapidly as the years pass with the prospect of substantial destruction in a decade or two more. But the wheels successively take an enormous quantity of the fish which reach them. The court will notice that witnesses for the defense testified (Seufert, p. 170; McGuire, rec., p. 217) that in the opinion of experts only about 5 per cent of the annual salmon catch is taken by the wheels. But this includes the entire river from the ocean; in the lower tide waters the fish are caught by nets, large seines, in weirs, traps, and other ways; but fish wheels, as is manifest and well known, can not be operated in tidal waters but only above the first rapids where the current is swift and the channel comparatively narrow. It is only here and there that it is profitable to maintain a wheel. It appeared clearly from one of defendants' witnesses (McGuire, rec., p. 220), that above the tide a very large proportion of the fish is taken in the wheels, cer-

tainly 50 per cent, probably much more. The testimony under cross-examination is as follows:

> Q. What percentage of the catch of the salmon is taken within 20 miles from the mouth of the Columbia—say 50 miles of the mouth of the Columbia?—A. Well, 50 miles, I should say 80 per cent at least, maybe 90, vary somewhat according to the stage of the water which affects the run somewhat. A large percentage, maybe 80 or 90 per cent.
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> Q. There is no fish wheels at the mouth of river?—A. No, sir.
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> Q. Then, while it is true that only 5 per cent of the fish have been caught in the fish wheels, it is also true that more than one-half per cent, approximately one-half per cent, of the fish caught in the upper part of the river were caught with fish wheels—that is, I mean one-half of the fish are caught with fish wheels?—A. I think so; probably more.
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> Q. In fact, when you go up to The Dalles, Seufert's, Winans' and the Salido fishery, practically all of the fish are caught with fish wheels, are they not?—A. A large percentage * * *.

So that the destruction of the fish is very rapid; there are few left for the Indian to catch even if he were allowed to fish, and the Indian complaint of the wheels and the steady depletion due to them is natural. The point of view of the defendants toward the Indians is the same but more thoroughgoing, for they think that every fish taken by an Indian means one less for them. (Audubon Winans, p. 215.)

Much of the testimony showing the verity of the Indian statements and the reasonableness of their claims comes from the defendants' own witnesses. It will not be forgotten that the Indians are not claiming exclusive rights, but only rights in common with others; it is the defendants who are claiming exclusive rights. There is a common right of fishing, but no right in anyone to monopolize. The defendants themselves testified and, as I have said, with entire frankness. If the Indians have any rights at all, their case could be rested almost solely on the testimony of the two Winans brothers (Rec., pp. 195–216), and I particularly commend that portion of the record to the court's notice. Their claim comes to this, that while if the Indians could fish at all, there are other points along this stretch where they could fish despite the wheels, which do not substantially affect the fishing; nevertheless they can not fish at all because the lands have been patented and are owned by the Winans; that the Indians can not cross the lands to come at the fish and can not fish anyway, and are without any rights or privileges whatever except what the Winans may choose to allow of their grace. And that does not appear to be much except blows and threats, expulsion and salmon tails. In short, the Indian has no right which the defendants are bound to respect.

In the light of this position subsidiary questions fall away. It is not worth while, for instance, to ask why the Indians should not from time to time, when the catch was abundant, have sold their moderate surplus.

There was certainly no reason in law or morals why they should not. It is not worth while to point out that if there were other fishing places along the Columbia, they were either the customary places of different bands and tribes, or were not such good fishing places, or were at points which, like this locality, have been inclosed under claim of private title. There was a general allegation in the answer that there were fisheries at places where the title was still in the Government, but that suggestion was left vague, and there was no proof on the subject. In any event the Indians have rights here, or they have not; they can not be shunted off to inferior places on the theory that it is legitimate defense to say that they will do well enough at other points. The best places go first in the commercial, private, and exclusive grasp. Sooner or later it is likely that all the fisheries will follow which it is worth while for the white man to take up. It is merely a question of the margin of profit, and is under an economic law similar to Ricardo's theory of rent. It is also of no consequence to meet the suggestions that one of the Yakima Indians living in the neighborhood has fenced his land and does not permit his fellow-tribesmen to enjoy it in common. That, like the Colwash trail point, seems to me preposterous. The particular Indian has a little, rocky farm; it does not reach the river. The shore strips of the defendants cut it off. There is no intimation that the Indians ever crossed it

or need to cross it to get to the river. It would naturally be fenced, and there is not the slightest proof that this Indian is unfriendly and unneighborly and excludes his fellows from his place, as the white men do, and if there were such proof it would have nothing whatever to do with this case. The defendants could not defend on the ground that there were bad or surly Indians who treat others as the defendants themselves do. All such suggestions fall by the way when the real question is perceived; but it is noteworthy that when the Indians could resort freely to this fishery they gave their surplus fish away to those who were in need, and this is quite in accordance with the instinctive Indian trait of hospitality. (Rec., p. 73.) They were formerly savage, and they may be improvident and shiftless in the face of civilization, which constantly tempts them, but they are generous and hospitable when they have plenty.

The question on this record simply is: What are the respective titles, and have the Indians any right whatever against the defendants' claim under Government patent and the sale of the State shore lands?

I have endeavored to set forth the situation briefly and to restrict the record citations, but I desire to refer the court to the following testimony in addition to that already cited, both of the complainants and the defendants, in which the salient features of the case will be found sufficiently and clearly emphasized: Of the Indian witnesses on behalf of the plaintiffs, Simpson (pp. 44–50); White Swan, the chief (pp. 51–54);

Moses Strong (pp. 59–62); White Salmon Charley, 93 years old, who was an interpreter at the treaty council (pp. 72–74); Bill Charley (pp. 90–99); of the white witnesses, Mr. Wood, the clergyman (pp. 117–124); Captain Martineau (pp. 124–133); of the defendants' witnesses, Frank P. Taylor, one of the predecessors in title (157–168); Seufert (pp. 168–184); Whealdon, who, under O. D. Taylor's ownership, ejected the Indians and removed their houses at Se-we-paum (pp. 188–199); and the two defendants, Lineas and Audubon Winans (pp. 199–207, 207–216).

HISTORICAL COMMENTS AND THE REPORTS.

This treaty and other like treaties with tribes in that locality rested from 1855 to 1859 without ratification. The exact reason can not be discovered, but it is probable (and indeed this is indicated in reports of the intervening years) that the Senate thought the treaties were too liberal. At all events, there were manifestly some objections. On the other hand, many Indians were opposed to the treaties. The chief of the Yakimas was irreconcilable and practically went into exile, although unavailing endeavors were made down to 1860, and perhaps later, to induce him to go on the reservation and help to hold his people together and civilize them. The failure to ratify the treaty of course increased the discontent. There were two or three serious hostile outbreaks among the Yakimas, and the party which had always been opposed to the treaty was enabled to say that the

Government did not intend what it promised, was not carrying it out, and would not, and that although it professed to extinguish the Indian title and give adequate compensation to the Indians surrendering their claims, nevertheless the United States would not ratify the treaty, and permitted white settlers to come in and take up the lands under the general purchase laws, entirely ignoring all the Indian rights. Finally, however, the treaty was ratified, and therefore, whatever the bargain means, the United States as well as the Indians assented to it conclusively.

If it should be suggested that the Indian testimony in this record about the negotiations and promises at the council is not a true statement of what occurred, but is merely colored to suit their present purposes, it is to be remembered that the Secretary of the Interior and the officers of the Indian service have more than once indicated the disparity between our easy promises to obtain treaties and the actual meaning of the instrument negotiated. For instance, in the report of the Secretary of the Interior for 1856 occurs this passage (p. 185):

> The object, throughout, has been to do ample justice to the Indians, and leave no room for the complaint, sometimes heretofore made, that they have been overreached by the white man. Whether such complaint was just or not, there is no doubt the Indians believed, or were persuaded by others, that just grounds existed for its indulgence. It must be admitted, that, in some cases, the "talks" with the Indians,

upon which treaties were based did not correspond with the treaties themselves, and that the Indians generally relied on these "talks," which they recollected and understood, and not on the treaties, as reduced to writing, which they seldom correctly comprehended.

The reports are full of evidences of the greed and aggression of whites and the inability of the Government effectively to protect its wards or its indifference on that subject.

> The existing laws for the protection of the persons and property of the Indian wards of the Government are sadly defective. New and more stringent statutes are required. The relation which the Federal Government sustains toward the Indians, and the duties and obligations flowing from it, can not be faithfully met and discharged without ample legal provisions and the necessary power and means to enforce them. The rage for speculation and the wonderful desire to obtain choice lands which seems to possess so many of those who go into our new territories, causes them to lose sight of and entirely overlook the rights of the aboriginal inhabitants. The most dishonorable expedients have, in many cases, been made use of to dispossess the Indian; demoralizing means employed to obtain his property; and for the want of adequate laws the Department is now often perplexed and embarrassed because of inability to afford prompt relief and apply the remedy in cases obviously requiring them. (Report of Commissioner of Indian Affairs for 1856.)

Speaking of other tribes than these, but accurately also of all Indians throughout the West, the report continues:

> Their condition is critical, simply because their rights and interests seem thus far to have been entirely lost sight of and disregarded by their new neighbors. They may be preserved and civilized, and will be if the guaranties and stipulations of their treaties are faithfully fulfilled and enforced, and the Federal Government discharges its obligations and redeems its pledged faith toward them.

In the report of the Commissioner for 1857 he refers to the critical condition in our relations with these and other neighboring Indians, and says that the non-ratification of the treaties heretofore made to extinguish their title to the lands necessary for the occupancy and use of our citizens seems to have produced no little disappointment, and the continued extension of our settlements into their territory without any compensation being made to them is a constant source of dissatisfaction and hostile feeling.

> They are represented as being willing to dispose of their lands to the Government, and I know of no alternative to the present unsatisfactory and dangerous state of things but the adoption of early measures for the extinguishment of their title and their colonization on properly located reservations, using and applying the consideration agreed to be allowed to them for their lands to subsist and clothe them until they can be taught and influenced to support and sustain themselves.

Again, from the report of the Salem, Oreg., superindent, September 1, 1857 (an exhibit to the Commissioner's report):

> The land laws which permit the occupation and settlement of both Washington and Oregon Territories, regardless of the rights of the Indians, render the intercourse laws practically a nullity. * * * Even the treaties which have been made remain, with but few exceptions, unratified, and of the few that have been ratified but few have been fulfilled. Those delays and disappointments, together with the unfulfilled promises which have been made to them, have had the effect to destroy their confidence in the veracity of the Government agents; and now, when new promises are made to them for the purpose of conciliating their friendship, they only regard them as an extension of a very long catalogue of falsehood already existing.

The reports even in those days constantly refer to the fact that deer and other game are scarce. (And see Rec., p. 137.)

Another report (Yakima agent, August 15, 1860, an appendix to the Indian Commissioner's report for that year), speaking of the Klickitats, with whom no treaty had then been made, says that white settlers have occupied the most valuable places for grazing, field culture, and fishing, driving the scattered and injured Indians from pillar to post, so that but one white settler, and he a former member of Congress, would allow them to remain even temporarily on lands

yet belonging to them. And he adds that the title of such lands "has always heretofore been acknowledged by our Government as vesting in the aboriginal inhabitants till fully treated with and ample compensation allowed."

THE RESPECTIVE TITLES.

The treaty with the Yakimas of 1855 (June 9, 1855, ratified March 8, 1859, proclaimed April 15, 1859; 12 Stat., 951) in the caption described the Indians as occupying the lands bounded and described; and by Article I they "cede, relinquish, and convey to the United States all their right, title, and interest in and to the lands and country occupied and claimed by them and bounded and described as follows," the boundaries and description being then set forth. The general region embraced and the particular tract involved in this controversy are included. By Article II there was *reserved* a tract of land bounded and described, which is the Yakima Indian Reservation. The last paragraph of that article provided that no white man should reside upon the reservation, and the tribes should settle there within one year after ratification; that in the meantime they might reside upon any land not claimed and occupied by citizens, or upon land so claimed or occupied with the permission of the owner or claimant, and the language expresses the guarantee by the Indians that citizens may occupy as settlers any lands not actually occupied and cultivated by the Indians at that time, not included in the reservation. There was a further provision that substantial improvements by

Indians—fields inclosed and cultivated and houses "erected upon the lands hereby ceded," which it may be necessary to abandon because of the treaty, shall be valued and payment made or improvements of equal value made upon the reservation. Article III provided that if necessary for public convenience roads may be run through the reservation, and on the other hand, the right of way, with free access to the nearest public highway, was secured to the Indians, with the right, in common with citizens, to travel upon all public highways. That article then expressed the particular provision now before the court, as follows:

> The exclusive right of taking fish in all the streams, where running through or bordering said reservation, is further secured to said confederated tribes and bands of Indians, as also the right of taking fish at all usual and accustomed places, in common with citizens of the Territory, and of erecting temporary buildings for curing them, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

The remaining provisions of the treaty were these: Article IV, "in consideration of the above *cession*," provided for payments of money by the United States, and directed the manner of its expenditure. Article V expressed the agreement of the United States to establish schools, build mechanics' shops, a sawmill, a flouring mill, and a hospital, which buildings and establishments were to be maintained and kept in repair. That article also provided for a sal-

ary to the chief. Article VI provided for a survey of the reservation and assignment of lots to Indians for permanent homes. Article X "reserved and set apart from the lands ceded by this treaty" for the use of the Indians the Wenatshapam fishery, subject to the usual provisions and restrictions concerning Indian reservations. This specially reserved fishery was ceded to the United States by an agreement concluded January 8, 1894, and approved by Congress by the act of August 15, 1894 (28 Stat., 320). The Indians received $20,000 for this fishery, and the language of the agreement is that "the said Indians hereby cede and relinquish to the United States all their right, title, interest, claim, and demand of whatsoever name or nature of, in and to all their right of fishery as set forth in Article X of said treaty aforesaid," etc.; and the United States paid that sum "in consideration of the foregoing cession and relinquishment" (see also record, p. 52).

Thus it is evident that this was not a mere treaty of peace and amity with the Indians, or of "friendship, limits and accommodation," providing for annuities in goods or money, but was in fact and law a treaty of cession of lands by accurate description and on consideration duly expressed.[a] Regarding the peculiar

[a] The different kinds of treaties with the Indians are thus described in the report of the Secretary of the Interior for 1856: "These treaties are of three classes—of peace and friendship; of acquisition, with a view to the colonization of the Indians on reservations; for providing for the permanent settlement of individual Indians upon separate tracts of land, as homesteads, and extinguishing at once or paving the way to the final abandonment of the tribal character." See also the report of the Commissioner of Indian Affairs for the same year for a more precise description of the differences.

nature of the Indian relation and their status as semi-independent domestic nations, with our sovereign power and title however paramount, it may be that in the strict and technical aspect they did not reserve but merely quitclaimed and received a grant back. Plainly, however, there can be no doubt that the proceeding was an accommodation of mutual advantage and convenience, and that on the whole the United States received at least as much as it gave. It was notorious, of course, that the Indians always demurred and thought that being under compulsion in the last analysis, they gave more than they got. In short, by the treaty the United States received a definite cession of lands and wiped out the Indian title and claim and reserved or granted to the Indians, under the guarantee of the national responsibility and honor, equally definite things, viz, a reservation by metes and bounds, an exclusive right of fishery in the reservation streams, a common right of fishery at all usual and accustomed places, with the attached privileges, and a separate, exclusive reserved fishery which was afterwards sold to the United States. There is no reason whatever why the common of fishery is not as real a right and as susceptible of determination as any other of the reserved rights. The only question is, what does it mean legally, and what effect does it have upon the later patents.

Various provisions of law regarding Territorial and Indian relations in that locality throw light upon our inquiry. Thus, in the organic act to establish the Ter-

ritorial government of Oregon (Aug. 14, 1848, 9 Stat., 323) there is this proviso:

> *Provided*, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to affect the authority of the Government of the United States to make any regulation respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent to the Government to make if this act had never passed: * * *

At that time Washington was included in the Territory of Oregon. In the organic act respecting Washington (March 2, 1853, 10 Stat., 172) the proviso is to the same general effect, but in briefer form, viz:

> *Provided*, That nothing in this act contained shall be construed to affect the authority of the Government of the United States to make any regulation respecting the Indians of said Territory, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the Government to make if this act had never been passed.

Paragraph 3, section 4, act of February 2, 1889 (25 Stat., 676), admitting Washington and other States, provides:

> That the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title to the unappropri-

> ated public lands lying within the boundaries thereof, and to all lands lying within said limits owned or held by any Indian or Indian tribes; and that, until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. * * *

This provision was expressly accepted by Article XXVI of the constitution of Washington.

Article XVII, section I, of that constitution asserts the State ownership of shore lands as follows:

> The State of Washington asserts its ownership to the beds and shores of all navigable waters in the State up to and including the line of ordinary high tide in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes; *Provided*, That this section shall not be construed so as to debar any person from asserting his claim to vested rights in the courts of the State.

The nature of the Indian title to lands, in general, is as follows: The United States, as sovereign and owner, has complete dominion and title. The Indians, as domestic, dependent nations, had or have possession and the right of occupancy, and this right is as sacred as that of the United States to the fee. It is incumbent, however, on the United States, in law and ethics, notwithstanding their absolute underlying rights as suc-

cessors to the former sovereignties and in the rights of discovery and conquest, to extinguish the Indian title to particular and definite tracts by agreements of cession and on terms of bargain and sale. The United States is bound, on the highest compulsions and sanctions controlling human institutions, to deal with the Indians on the most liberal doctrines of construction and the most generous rules of duty and obligation to inferiors known to our national principles and in international law. (*Fletcher* v. *Peck*, 6 Cr., 87; *Johnson* v. *McIntosh*, 8 Wh., 543; *Cherokee Nation* v. *Georgia*, 5 Pet., 1; *Worcester* v. *State of Georgia*, 6 Pet., 515; *United States* v. *Cook*, 19 Wall., 591.) These determinations as to the Indian rights were expressed as follows, aptly enough in point of time and accuracy, regarding the present controversy, in the report of the Secretary of the Interior for 1857:

> The members of the Indian tribes within our limits, while they are not citizens, can not, with strict propriety, be termed foreigners. "Domestic dependent nations, their relations to the United States resemble those of a ward to his guardian. They look to our Government for protection and appeal to it for relief to their wants." While we negotiate treaties with them, which are ratified with all the solemnity befitting a contract to which nations are parties, we undertake to construe and execute their provisions, acknowledging no responsibility but such as we may owe to truth, honor, and justice. As the limits of our civilization have been extended the number of these children of the forest

with whom our people are brought into immediate contact is greatly increased. Treaties multiply; rights are acquired; mutual obligations are assumed; obedience is promised on the one part, protection is guaranteed on the other.

In *Worcester* v. *State of Georgia* (*ut sup.*) Mr. Justice McLean in his concurring opinion said:

> The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. * * * How the words of the treaty were understood by this unlettered people, rather than their critical meaning, should form the rule of construction.

This language was quoted and approved in *Choctaw Nation* v. *United States* (119 U. S., 1), and in *Jones* v. *Meehan* (175 U. S., 1). In the former case the court added:

> The recognized relation between the parties to this controversy, therefore, is that between a superior and an inferior, whereby the latter is placed under the care and control of the former, and which, while it authorizes the adoption on the part of the United States of such policy as their own public interests may dictate, recognizes, on the other hand, such an interpretation of their acts and promises as justice and reason demand in all cases where power is exerted by the strong over those to whom they owe care

> and protection. The parties are not on an equal footing, and that inequality is to be made good by the superior justice which looks only to the substance of the right without regard to technical rules.

And in *Jones* v. *Meehan*, Mr. Justice Gray said that an Indian treaty should be construed "Not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."

The title of the defendants is deduced as follows: The lands involved were conveyed by three patents from the United States, viz:

(1) Patent dated July 2, 1866. Conveys to William P. Murphy—

> Lot 1, in section 17;
> Lot 2, in section 19; and
> Lots 4 and 5, in section 30, in township 2 north, of range 14 east, containing 70½ acres. (Rec., p. 233.)

There is no reservation or condition in this deed.

(2) Patent dated September 20, 1869. Conveys to William Taylor—

> Lot 5, section 19;
> Lots 1, 2, and 3, section 30; in township 2 north, of range 14 east, containing 99 acres. (Rec., p. 234.)

There is no reservation in this patent.

(3) Patent dated May 10, 1889, conveys to Orson D. Taylor—

> Lots 1, 2, and 3, and the northeast ¼ of the

> southwest ¼ of section 25, township 2 north, of range 13 east, containing 164¾ acres. (Rec., p. 232.)

The patent contains this reservation:

> To have and to hold the same * * * subject to any vested and accrued water rights for mining, agricultural, manufacturing, or other purposes, and rights to ditches and reservoirs used in connection with such water rights, as may be recognized and acknowledged by the local customs, laws, and decisions of courts, etc.

It seems to be conceded that these patents conveyed title only to the ordinary high-water mark along the river.

The different conveyances of the lands covered by the three patents are set out in the stipulation, at pages 227–229 of the record. The Winans claim is founded upon a bond for a deed executed by the present owner, who holds the title under the patents by the mesne conveyances set out. The patents (pp. 232–234) all appear to have been issued under the act of 1820 for the public or private sale of Government lands. (3 Stat., 566; Rev. Stat., secs. 2353 *et seq.*)

The agreement between the State of Washington and S. Farrell for a portion of the shore lands lying between the river and the lands involved in this suit is set out in the record at pages 234–237. This agreement is dated January 28, 1896, six months after the filing of this suit (bill filed July 11, subpœna issued July 31, 1895).

It is also stipulated (Rec., p. 229) that the other contracts of sale of shore lands by the State to Farrell contain the same stipulations as that set out on pages 234–237 of the record; that these contracts call for all the shore lands lying between the patented lands involved in this suit and the low-water mark of the Columbia River; that these contracts were executed in accordance with the laws of the State of Washington; and that all these contracts for the purchase of the shore lands have been entered into since the filing of this suit.

The defendants have acquired the shore land interests under these contracts of purchase from the State.

The first patent was issued in 1866; the second patent in 1869. In 1884 a circular was sent to land officers instructing them to refuse peremptorily all entries and filings attempted to be made by others than Indian occupants upon lands in possession of Indians who have made improvements of any value whatever thereon (Rec., p. 146; the date of Secretary Teller's approval, May 31, *1894*, is evidently an error in the printing). In 1888 (Rec., pp. 230–232) the local land officers were instructed not to allow entries or filings on any lands embracing Indian fisheries in this township

The third patent was issued in 1889.

I say, then, that at all times, in the hands of the original patentees and thence on, there was notice and actual knowledge by reason of the treaty provisions, by reason of the notorious Indian use of this fishery, that private ownership of the land was subject to this

servitude. I say that, beyond question, when the Winans in 1893 gathered up and collected these various tracts and claims which they held under the somewhat peculiar form of a bond for a deed, but not an actual deed, and under assignments of contracts to purchase, they were conclusively charged with knowledge of the situation and knowingly tried the experiment and took their chance of making their enterprise a success, shaking the Indians off and establishing their title as absolute. They are fatally challenged at every point by the known facts and the notorious Indian rights and the duty and endeavor of the Government to protect them. Their position is not that of an innocent and *bona fide* purchaser without notice; their title is covered by a valid right and servitude, and they knew it *ab initio.* The suit on behalf of the Indians against Frank P. Taylor was begun and finished, issuing in a judgment directing that the Indians be permitted to fish, long before the third patent to O. D. Taylor, and long before the purchase by the Winans of the various interests. (Testimony of F. P. Taylor, pp. 164–166.) It sufficiently appears that F. P. Taylor did not give a warranty deed when he sold, because the purchasers knew the condition the property was in and that a suit against him was pending. "They knew that there had been litigation and that the Indians were trying to set up rights." Nobody was deceived, and the adverse claims were fully understood. And the later litigation by the United States against O. D. Taylor was also well known. It is easy to say that if there is any

equity, the equity is due from the United States; it is the United States which has been improvident, but nevertheless an absolute title was given and the United States must compensate. The only equity which can be due is that which rescues the fishery under the principle of specific performance, and this can only be worked out on and over the claim of private title. The opposite contention begs the question.

I confidently submit that the patents never gave an absolute title, and that the fee was always conditional. The treaty gave the right. Congress has never divested the Indians of the right. It is wholly untenable to assert that because the land was improvidently patented under one of the acts for the sale of public lands, the right was divested indirectly by the law of Congress and directly by the executive act. It is altogether unsound to suppose that an executive officer, mistakenly and wrongly issuing a patent without proper reservations, under such circumstances, can by that act devest valid vested rights. The right of taking fish was granted by the law-making power of the nation; in the face of that express grant it can not be taken away by any act of an executive officer.

ARGUMENT.

I.

Previous adjudications on the same controversy, and on similar claims.

This is an old controversy, and was fully adjudicated when Frank Taylor, one of the witnesses for the defense here (rec., p. 157), held title under patent to

part of the land. The case went to the Supreme Court of the Territory, which sustained the Indian claim and remanded the cause for further proceedings. (*United States et al.* v. *Frank Taylor*, 3 Wash. Ty., 88.) The statement there concisely sets forth the respective claims, and the argument on behalf of the Indians strikes the keynote of the present controversy, as follows: That a treaty is part of the supreme law of the land; that when two constructions are possible, one restrictive and the other liberal, the latter is to be preferred; that this rule has a peculiar application in the case of such a treaty as this, because it was made by a powerful and enlightened nation with ignorant and barbarous tribes who occupy toward that nation the anomalous attitude of a high contracting party, and at the same time of a ward. The Indians were not only dependent upon the nation with whom they dealt for the aptness and adequacy of the language of the treaty to protect their reserved rights as well as to cede their country, but even for the interpretation and construction of that language. All reasons combine to give a liberal meaning to the language employed and to prevent the treaty from being construed to the prejudice of the Indians. It was argued that the acts of Congress providing for sale and grant of the public lands could not be viewed as operating to repeal these treaty stipulations; that it is not within the power of the courts or executive officers of the Government to contravene the treaty provisions, and is not within the power of the Government in issuing a patent to deprive these Indians of a

treaty right secured to them. If the right claimed was reserved to the Indians by treaty stipulation, Taylor and his grantors were charged with knowledge and the reservations of the treaty are in effect imported into the patent. The court determined the case under the terms of a stipulation which was similar to the stipulations now before this court, and held that, applying the liberal rule of construction of treaties, the question was whether the significant paragraph in the treaty was a reservation from the force and effect of the cession of the treaty of the rights specified, or should be construed as a specific grant of rights by the United States. The determination was that the Indians in making the treaty intended to grant only such rights as they were to part with rather than to convey all with the understanding that the particular rights were to be reconveyed to them; that the language reserved to the Indians the right to continue to enjoy the ancient fisheries, and did not convey to them all places which were, or which in the future might become, usual and accustomed places of fishing, because that view would make the right to use the shore for the purpose of erecting houses and drying fish a servitude imposed upon all the shore line of the Territory—a sort of floating servitude liable to disturb the possession of any patentee or purchaser, although at the time of purchase his water front might never have been a place used for taking fish. It was also held that the public land acts simply authorized the appropriation by the settler of unappropriated lands, and only author-

ized the extinguishment of the title which the Government holds at the time of appropriation, and if any servitude or easement is impressed upon the land selected, then the settler takes subject thereto.

The controversy came up again in the Federal court (44 Fed. Rep., 2) on a rule to show cause why O. D. Taylor, a successor to the title of Frank Taylor (Rec. herein, pp. 228–229), whose name appears frequently in this record in connection with ousting the Indians and removing their houses when he was in possession, should not be punished for contempt in violating the injunction which the District Court of the Territory under the remand from the Supreme Court finally granted against Frank Taylor. The Circuit Court of the United States held that the case in the Territorial courts was pending when those courts went out of existence, and the case was lawfully transferred to the Federal court under the enabling act of February 22, 1889 (25 Stat., 676); that the jurisdiction of the Federal court included the power to punish a violation of the Territorial court's injunction, and a motion to discharge the rule to show cause was denied. That decision was rendered by Judge Hanford, and therefore it seems that, on the one hand, the Indian claim to these fishing rights has been adjudicated in their favor by the territorial courts, and that adjudication has been sustained by Judge Hanford; and, on the other hand, that in the present case, following his own previous decisions in *United States* v. *Alaska Packers' Association* (79 Fed. Rep., 152), relating to a fishing claim of the Lummi

Indians under a similar treaty, and the *James G. Swan* (50 Fed. Rep., 108), relating to like privileges claimed by the Makah Indians, the Indian claim has been denied altogether, on the ground that they are only on an equal footing with other citizens who have not acquired exclusive proprietary rights; that the operation of fishing wheels, which necessitates exclusive possession, is a part of the defendants' exclusive rights, and that the Indians can not legally demand to interfere with such rights under the terms of the treaty in respect to fishing privileges in waters outside Indian reservations.

In the *Alaska Packers' Association* case it was held that the similar article of that treaty gave the Indians a general equality of rights coequal with citizens, but not exclusive rights at any particular places; that the issuance of ordinary titles to public lands was contemplated by the treaty, and that it is unreasonable to suppose that all public lands adjacent to fishing waters were permanently impressed with an easement in favor of the Indians. In that case it seems that there were no inclosures, and the complaint was that by reason of the fish traps established the Indians were not able to fish so successfully as before; but the court held that, notwithstanding the fish traps, there was still ample room for the Indians to engage in fishing, and that they can do so successfully at all seasons.

The danger suggested by Judge Hanford is fallacious. It may be unreasonable to suppose that all public lands in Washington adjacent to waters where

fish may be taken are permanently impressed with an easement in favor of the Indians. The contention here is no such large and vague thing, but simply that this particular narrow strip of land, extending for a short distance along the Columbia, where fish were taken in fact by the Indians through unnumbered generations probably, where this definite, ancient fishery existed, was impressed with the easement and servitude.

The gist of the Alaska Packers' case is that while the Indians were interfered with by private ownership under patent and State license, they were not absolutely prevented from all approach to and participation in the fishing. In the present case the exclusion is absolute and the distinction between the two cases is manifest. The Indians were not intended to have exclusive rights, but rights in common with citizens, but it was certainly not intended to give them no rights at all by the easy process of saying that neither citizens nor they had any right whatever after a patent was issued. That point is always accentuated in such cases by showing or arguing that white citizens do not claim any such rights and the Indians therefore have none. But the indifference of whites, or their more easy yielding to the exclusive private claim, ought not to prejudice or defeat the Indians. Among citizens in general, outside the limited class who maintain permanent fisheries, river fishing is a temporary occupation or pastime, but with Indians in that northwest country, it was and is the staple dependence and an immemorial and permanent means of livelihood

This dependence of the Indians and their relations to this place were perfectly well known to the Government when the treaty was negotiated and ratified. They were entitled to fish at this usual and accustomed place. It is idle to suggest that they can approach and reach the river at other points and then fish from boats. It is an obvious fact that fishing on the various rapids of the Columbia can only be done from the banks. If it were true that the Indians could reach the river at other points and then pass up or down the stream in boats to these particular fishing places, it would make little difference to them whether these lands were fenced or not; but it is about as impossible to navigate and fish upon the dalles and rapids of the Columbia as the rapids of Niagara.

In the case of the *Swan* there was a proceeding to forfeit a schooner for killing fur seals in the waters of Alaska. The vessel was owned by a Makah Indian, and the defense was that the vessel was especially privileged to engage in sealing in Bering Sea by virtue of the treaty with that tribe, which provided that "the rights of taking fish and of whaling and sealing at usual and accustomed grounds and stations is further secured to said Indians in common with all citizens of the United States, and of erecting temporary houses," etc. The court held that this language only secured to the Indians an equality of rights and privileges in common with all citizens of the United States, and gave no support to a claim for peculiar or superior rights or privileges denied to citizens in general. In

other words, of course, the claim of higher or exclusive Indian rights could not be heard to prevent the forfeiture of a vessel engaged in violating a statute.

II.

General principles and the extent of State power and rights.

Under English law there were three kinds of fisheries. A free fishery, or exclusive right of fishing in a public river, which was a royal franchise; such right to be valid must be very old, because Magna Charta and the later charters directed that rivers fenced should be laid open and forests be disafforested. A several fishery was one vested in or derived from the owner of the soil. Both a free fishery and a several fishery were exclusive rights, in which they differed from a common of piscary. (2 Bl. Com., 39, 40; id., 417 *et seq.*) But it was a general and settled principle of English law that there was a public domain in navigable waters and their beds extending to the usual high-water mark, and that within that limit the right of fishery is common to all, and this principle has been generally recognized in the United States, excepting so far as it has been restrained by positive law or by grant from the State. In this country the presumption is against the existence of an exclusive fishery. (*Weston* v. *Sampson*, 8 Cush., 346, 352; *Carson* v. *Blazer*, 2 Binn., 475; *Yard* v. *Carman*, 2 Pen. (N. J.), 681, 686; *Melvin* v. *Whiting*, 7 Pick., 79; 1 Pingrey on Real Property, 107, 108; Washburn on Easements and Servitudes, 533.)

The riparian owners on principal rivers of a State have not an exclusive right to fish, but the right is vested in the State and open to all. (*Carson* v. *Blazer, ut sup.; Shrunk* v. *Schuylkill Navigation Co.*, 14 S. & R., 71.) The rule is otherwise in non-navigable rivers, the right of the owner of adjoining lands extending to the middle of a stream, but under such restraints as the government may impose—the right of regulating the subject, whether in navigable or other streams, residing in the State. (*Waters* v. *Lilley*, 4 Pick., 145; *Commonwealth* v. *Chapin*, 5 Pick., 199.)

Two views of the subject appear thus to be drawn from the original sources, viz, that the right of fishery is a common right, belonging to the public; that it is an exclusive right belonging to the owner of the soil and incident to the dominion of the soil, whether public or private. In either aspect the Indian claim here is logical and rational, sustained either as a right held in common with citizens, or as a right immemorially incident to their own possession and occupation, which was recognized or reserved by the Government in its public dominion over the soil and its title as owner.

The States hold the absolute right to all navigable waters within their territorial limits, including the soil under them and the fisheries therein (*Smith* v. *Maryland*, 18 How., 71; *Manchester* v. *Massachusetts*, 139 U. S., 240; *Shively* v. *Bowlby*, 152 U. S., 1), subject only to the rights which the Constitution provides shall be exercised by the General Government in the regulation of commerce (*Martin* v. *Waddell*, 16 Pet., 367).

In *McCready* v. *Virginia* (94 U. S., 391) Chief Justice Waite, delivering the opinion of the court, said:

> Each State owns the beds of all tide waters within its jurisdiction, unless they have been granted away. * * * In like manner, the States own the tide waters themselves and the fish in them, so far as they are capable of ownership while running. For this purpose the State represents its people and the ownership is that of the people in their united sovereignty. * * * The title thus held is subject to the paramount right of navigation, the regulation of which, in respect to foreign and interstate commerce, has been granted to the United States. There has been, however, no such grant of power over the fisheries. These remain under the exclusive control of the State, which has consequently the right, in its discretion, to appropriate its tide waters and their beds to be used by its people as a common for taking and cultivating fish, so far as it may be done without obstructing navigation. Such an appropriation is in effect nothing more than a regulation of the use by the people of their common property. * * * It is, in fact, a property right, and not a mere privilege or immunity of citizenship.

In *Manchester* v. *Massachussetts* the court suggested the question whether there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, but expressed no opinion upon it, hold-

ing that the preservation of fish is a subject which a State may well be permitted to regulate within its territory in the absence of any regulation of the United States. (See also *Holyoke Co.* v. *Lyman*, 15 Wall., 500.)

It has been held that the public have the right to take fish in navigable waters below high-water mark, though upon soil belonging to an individual (*Bickel* v. *Polk*, 5 Harr. (Del.), 325). The ownership of submerged lands is not a mere easement, but a title in fee, subject, however, to the public rights of navigation and fishery (*Shively* v. *Bowlby*, 152 U. S., 1, 19, and *passim*). A grant of the land under navigable water does not impair the common right of fishing therein (*Hogg* v. *Beerman*, 41 Ohio St., 81), and as the owner of lands adjoining public waters has no exclusive right of fishing there, he can not in a grant of such lands reserve the right of fishing in the adjoining waters disconnected with the shore (*Sloan* v. *Biemiller*, 34 Ohio St., 492).

The State may grant to individuals the exclusive right of fishing in any of the navigable waters of the State (*McCready* v. *Virginia*, 94 U. S., 391; *Lowndes* v. *Huntington*, 153 U. S., 1) provided vested rights are not infringed thereby (*Hathaway* v. *Thomas*, 16 Gray, 290). The public right of fishing in navigable waters extends to high-water mark (*Shively* v. *Bowlby*, *ut sup.*).

In *Eisenbach* v. *Hatfield* (2 Wash., 236) the contention was that whatever may be the title of the State to the soil under tide water, a riparian owner by virtue of his contiguity to the water has certain vested rights of property beyond those of the general public peculiar

to himself, including a right to wharf out opposite to his upland, a right of ferriage, a right of unobstructed access to the navigable water, and a right to further accretions. The court held, under rules laid down by this court, that tidal lands belong to the State, which has full power to dispose of them, subject only to the restrictions imposed by the constitutions of the United States and the State, and no individual can claim any easement in them or impose any servitude upon the tide waters of the State without the consent of the legislature; that a riparian proprietor on the shore of the sea or its arms has no rights as against the State or its grantees to extend wharves in front of his land below high-water mark. There was a vigorous dissent based upon a territorial statute which it was contended had not been repealed by the constitution or laws of the State—in which the authorities were distinguished and the opposing principles invoked for the view that the natural riparian rights and the expenditures made in reliance upon them ought not to yield to the idea of legal title and sovereign dominion. I cite this case to show how a State claim of right and control over the shore and contiguous waters has been construed in this particular State.

Now, amid all the rules and authorities respecting Federal and State control, tide lands and navigable rivers, fisheries, shore access and riparian rights, one fact stands out clearly and sharply in this controversy. The State entered upon its domain and dominion subject to all valid rights granted or reserved while the Federal

Government was administering the Territorial condition, exercising full sovereignty and acquiring and disposing of the ownership of public lands and public rights in its dealings with the Indians and others during that period.

The organic act of 1853 (10 Stat., 172), separating Washington from Oregon and erecting it into a Territory, recognized and preserved as usual the authority of the General Government to regulate in their absolute sovereign competence the Indians, their lands, property or other rights, by treaty, law, or otherwise. The act of 1889 (25 Stat., 676, par. 3, sec. 4), admitting Washington with other States into the Union, contained a declaration on behalf of the inhabitants of those States, disclaiming all rights in unappropriated public lands and Indian lands which remained under the absolute jurisdiction and control of Congress. This provision was expressly accepted by the constitution of Washington, and therefore, since within the letter and spirit of those enactments, the rights now in question, if validly granted or reserved, are beyond the State control, the provision of the State constitution asserting the ownership of the beds and shores of navigable waters must necessarily be taken to recognize an exception of rights carved out and disposed of before the State dominion and jurisdiction attached. Indeed, the proviso of that article of the State constitution permitting any claim of vested rights to be asserted in the courts of the State recognized this principle, and in accordance with that proviso the right here

involved was adjudicated by those courts in favor of the Indians. This principle was fully recognized in *Shively* v. *Bowlby*, which held that while new States admitted into the Union since the adoption of the Constitution have the same rights as the original States in the tide waters and in the lands under them within their respective jurisdictions, and the title and rights of riparian or littoral proprietors therefore are governed by the laws of the several States, subject to the rights granted to the United States by the Constitution, nevertheless the United States, while they hold country as a territory, have all the powers both of national and municipal government, and may grant for appropriate purposes titles or rights in the soil below highwater mark of tide waters. This doctrine fully covers the grant or reservation to the Indians of their fishery rights, assured by the United States under treaty stipulations soon after that region passed from the Indian country status into the Territorial condition, and long before it became a State. Therefore, any State contracts for sale of shore lands or State licenses for the exercise of fishing rights are subject, on fundamental principles, to all prior rights vested and established under the authority of the United States. The State is founded on acceptance of the Federal Constitution and authority and on recognition of rights derived therefrom. Therefore, to construe the State shore grant as altogether dispossessing the Indians of this vested right would deprive them of property without compensation and without due process of law.

III.

The patents and titles drawn from them are subject to this servitude.

The Indians' claim is not merely meritorious and equitable; it is an immemorial right of a nature and duration which stood for the most perfect and impregnable title in the English notions of a ripened prescription. It is not like such a claim as was advanced on behalf of the Mission Indians (*Barker* v. *Harvey*, 181 U. S., 481), strong in its appeal of equity, but revealing a failure to take the necessary steps to perfect the right under the law, which caused it to yield to the white man's patents. Here this historical right, peculiar to Indians so located and peculiarly valuable to them, was recognized and assured by treaty, and beyond doubt this recognition and assurance were in large part the reason why the United States was enabled to extinguish on behalf of white settlers the Indian title to that large body of land in the Cascade country. The terms of the treaty, as I have pointed out, show, not a loose and vague equity, but a definite granted or reserved right. If it might have been doubtful whether this or that other point on the river, to which the Indians resorted for fishing, was a usual and accustomed place, there can be no manner of doubt that this fishery along the Winans property was such a place, because it was the most famous fishery on the Columbia River. The treaty speaks in terms of cession, grant, and conveyance of a definite Indian title to lands, and the definite items of consideration because of which the grant was

made are set forth as in any private contract of sale and conveyance. The same principle of bargain and sale, grant and payment, is manifested by the later agreement under which the Indians retroceded or conveyed the particular reserved fishery at Wenatshapam. Here is not an equity which the United States, if it improvidently granted, should meet and respond to, but a plain condition, easement, or servitude under which the defendants took over this property, staring them in the face in many ways, as I have pointed out herein, through the years when they were familiar with this locality and were making up their minds to experiment with the situation and take the chances of maintaining the exclusion of the Indians.

A mistake in the general and practical sense was manifestly made when the executive officers of the Government improvidently issued the patents here without due and express reservation of the Indian rights, although, of course, the object of our argument in this brief, made with confidence, is to show that such reservation was not necessary to protect the Indians. The ground of equitable intervention here, however, is not technically that of mistake or fraud; we are not endeavoring, contrary to the acts of limitation on suits to vacate and annul patents (viz, as to patents issued during the period here in question, the act of March 3, 1891, 26 Stat., 1093) to set aside and cancel a patent on the ground of mistake or fraud. What we are seeking to do is simply this: We are asking the court to recognize the righteousness and

justice of the Indian claim, to declare and establish by its equity powers, and with due observance of the notion of specific performance, the trust for the Indians which at all times has been an essential ingredient of private title to these lands. The trust is not only an obligation in the form of equity due from the Government as negotiator of the treaty and guardian, but is a condition and limitation under which the private rights were taken. The private rights and claims, in other words, are valid just so far as they are not inconsistent with and exclusive of the Indian rights and claims, but no further.

The principle that a patent does not invariably and inevitably convey an absolute title beyond all inquiry and free of every condition is fully sustained by the authorities.

Ledyard v. *Trezevant* (160 U. S., 452) was an action brought to restrain the board of engineers from constructing a public levee through complainant's plantation. It appeared that a doctrine, said to have been derived from the Code Napoleon, existed in the Territory of Louisiana before its purchase by the United States, "that lands abutting on the rivers and bayous were subject to a servitude in favor of the public, whereby such portions thereof as are necessary for the purpose of making and repairing public levees may be taken in pursuance of law without compensation." This servitude was explicitly asserted in the Civil Code of Louisiana, and continues to the present time. The contention was that complainant owned the land in fee through title derived by patent from

the United States, without reservation, and that no condition attached to his ownership, whatever may have been the conditions of the ancient grants; that the servitude under which lands were held, whose titles were derived by grant from Spain or France or from the State, did not attach to lands whose titles were derived from the United States. The court took the contrary view, holding that the property, although patented by the United States, was held subject to the operation of the State law respecting construction of public levees, and could not pass to a purchaser free of that reservation. In that case the court cited, among other authorities, *Ruch* v. *New Orleans*, 43 La. Ann., 275; *Barney* v. *Keokuk*, 94 U. S., 324; *Packer* v. *Bird*, 137 U. S., 661; *Hardin* v. *Jordan*, 140 U. S., 372; *Shively* v. *Bowlby*, 152 U. S., 1.

The present case illustrates that principle precisely, but it is even stronger. It can not well be doubted that the Indian claim to the most scrupulous construction and fulfillment of the Government's obligations to them is a call upon the highest standards of national honor. There is no stronger illustration of national *noblesse oblige*. An obligation like the present one, for fulfilling which the faith of the Government is directly pledged, is a much more manifest and impressive servitude on later rights than a relic in existing State law of a rule of the code of civil law before the State was in existence. Further, here one of the patents contained on its face a reservation which in spirit and intent embraced the Indian right, and respecting all of the patents as well as the State shore land title there were

warnings and notices all through from the original fact of the great value of the fishery as the Indians' ancient resort through the various litigations to test the question and the notices and instructions from the Interior Department that entries and filings by white people would not be permitted. The Government's engagement was to give the Indians this fishery, or rather to preserve it for them. The Government could not give them as good a fishery—perhaps could not give them any now—and is not liable in law or morals for that in any case. The defendants can not say, "If there is any equity, it is not due from us; let the Government make it good." The Government is bound to achieve, if possible, a specific performance of its treaty agreement, and the defendants always knew this and took their property subject to the liability and equity to respond in such a proceeding as this to the demands of the valid servitude.

I submit that the decree below should be reversed and the cause remanded for such further proceedings as may be necessary and appropriate. I suppose that the question of framing a proper decree would be remanded to the court below either without instruction from this court beyond the judgment of reversal, or else with some direction as to its terms. If to make the temporary restraining order below as modified a permanent injunction in the case would not meet its necessities, then it will be necessary to consider what justice and equity fairly require. It seems quite clear

that the fish wheels are very destructive of the fish, and therefore are improvident and unconscionable devices. It certainly seems that four wheels in the space of a mile and a half are inordinate. If they are to be maintained at all, there should be some restriction as to their number and method and daily hours of operation, in order to give the fish and the Indians a chance. Certainly the wheels should not be permitted to create and maintain a monopoly until all the fish are gone. One at least of these wheels has been placed at a particular spot which was obviously a most advantageous place for the Indians to fish, because there was a great rock there from which their platform or staging projected, so that they could use their dip nets for the longest possible time without being driven back up the bank or bluff by rising water. There were other favorite spots where they ran trestles out over the water for the same purpose. In any case, if it is true that they can fish to advantage elsewhere than at the particular points where the wheels are, they should be allowed to fish without undue restriction up and down the river and above and below the wheels throughout the entire water front. On the other hand, they can not claim to have an exclusive right, and, enjoying their right in common with citizens and under the modified injunction in common with defendants, it may be just to restrict in reasonable ways their times and modes of access to the property and hours for fishing. If it is not fair under the present conditions that they should enjoy without restriction their ancient

right of camping and curing fish in temporary houses on the defendants' property, a decree can indicate the proper limitation. It may be that there ought to be some composition of that right, or some arrangement by the defendants or the United States, or both. There appear to be Indian lands in the vicinity, as marked on the plat, which, if not in private Indian ownership, may enable the executive branch of the Government to accomplish such an arrangement or composition. It appears clear, as noted below, that the privilege of pasturage, etc., is confined to open and unclaimed land, and here again it would seem to be the duty of the executive Government to facilitate the enjoyment of the Indians of those rights on the nearest and most convenient available land. By some proper route following the old trails, and at proper hours, with due protection for the defendants' buildings, stock, and crops, a way of easy access, free ingress and egress to and from the fishing grounds, ought to be open to the Indians and be kept open.

The court will note that the privilege of hunting, gathering roots and berries and pasturing horses and cattle, is expressed to be "upon open and unclaimed land." The right to erect temporary buildings for curing purposes is distinct and separate and manifestly relates to the particular place; that is to say, the right of temporary occupancy at usual and accustomed places attached to the bordering lands,—the strip along the river at such points which was closely adjacent or contiguous.

It seems proper thus to suggest what principles and terms may pertinently and rightly inform a decree in favor of the appellants, which this court may see fit to make or direct the court below to make. And I have the honor respectfully to submit that the decree below should be reversed, and the cause remanded for the entry and enforcement of the proper decree.

HENRY M. HOYT,
Solicitor-General.

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